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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 967

PENNSYLVANIA GREYHOUND LINES, INC.,
Petitioner,

against

MARIE ROWE, WALTER H. ROWE, FERNN V. ROWE and HENRY C. ROWE,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND APPENDIX.

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MARIE ROWE, WALTER H. ROWE, FERNN V. ROWE and HENRY C. ROWE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Pennsylvania Greyhound Lines, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the above entitled matter, affirming a judgment of the United States District Court for the Southern District of New York in favor of respondents.

The Opinions of the Courts Below.

There was no opinion in the District Court.

The opinion of the Circuit Court of Appeals for the Second Circuit by Judge Lumbard is printed in the appendix hereto (pp. 17-22) and is not yet reported.

Jurisdiction.

The judgment of the Court of Appeals for the Second Circuit sought to be reviewed was decided and entered on March 16, 1956, and is printed in the appendix hereto (p. 23). Petition for rehearing was denied on April 19, 1956.

The jurisdiction of this Court is found in 28 U. S. Code Section 1254(1).

Questions Presented.

1. Whether the Court of Appeals in affirming the judgment of the District Court in this diversity case has erroneously decided an important question of New York law with respect to circumstantial evidence, this decision being in direct conflict with the controlling decisions of the New York Courts, and therefore contrary to the rule of *Erie* v. *Tompkins*, 304 U. S. 64.

2. Whether the Court of Appeals in affirming the judgment of the District Court in this diversity case has erroneously decided a matter of general interest and importance on the question of the sufficiency of evidence to take a case to the jury in a negligence action involving a claimed collision between motor vehicles in congested traffic where there is no direct evidence of contact between the vehicles or of negligence and where the jury has been left to pure speculation as to both contact and negligence.

Statement of the Case.

This action was brought by plaintiffs for alleged bodily injuries to the two plaintiffs, Marie and Fernn Rowe. It is claimed that defendant's bus negligently came into contact with Walter Rowe's automobile in which Walter, his wife Marie Rowe, his sister-in-law Fernn V. Rowe and his brother Henry C. Rowe were riding. No claim for personal injuries was made by either Walter or Harry Rowe, but each claimed damages based on loss of his wife's services and for medical expenses (pp. 3a-8a). No claim was made for damage to Walter's car.

Plaintiffs' attempt to prove that defendant's bus was in contact with Walter's car and that defendant was negligent was based entirely on circumstantial evidence. Admittedly there was no direct evidence whatsoever as to either contact or negligence.

It was Saturday afternoon August 21, 1948 and plaintiffs were driving north on Route 40 near Baltimore, Maryland (pp. 14a, 29a) having come from Lynchburg, Virginia, their ultimate destination being Lynn, Massachusetts where plaintiffs reside (p. 14a). Walter and Harry were in the front seat with Walter driving; Marie and Fernn were seated in the back seat, directly behind the men (pp. 20a, 25a). Route 40 is a four-lane road with two lanes in each direction (p. 15a). Traffic was heavy (pp. 16a, 42a).

Walter was driving his car in the outside northbound lane with cars both immediately ahead and behind in his lane (pp. 16a, 39a) and the inside lane, to his left, had a similar line of traffic. He saw the defendant's bus go by in the inside lane (p. 16a) but a little further on Walter passed the bus because Walter's lane then was moving faster than the inside lane (p. 17a). Shortly thereafter

he approached a traffic light and four or five cars ahead of him stopped for the light (pp. 18a, 44a). He pulled up to the car next in front (p. 43a) and had just stopped (pp. 18a, 46a) when he felt an impact on the rear of his car (p. 18a) which moved the rear of his car slightly to the right (p. 20a). A second or two later he looked to his left and observed the defendant's bus go by (p. 47a), still in the inside lane (p. 19a).

The plaintiffs did not see what had contacted Walter's car nor did they see defendant's bus make any such contact (pp. 18a, 19a, 86a, 87a, 93a, 94a, 141a, 142a). Nor did they produce anyone who saw any such alleged contact. *None of the four plaintiffs looked to the rear* to see what had caused the alleged impact; no one got out of the car to look to see if any damage had been done; and not one of them looked to see if there was a car immediately *to the rear in the same lane* which had been in contact with plaintiffs' car. The plaintiffs' description of the effect of the alleged impact (pp. 20a, 78a, 93a, 143a) indicates clearly a rear-end collision and plaintiffs made no mention of any "sideswipe" at any time.

After the light changed Walter waited for the cars in front of him to move, put his car into gear, blew his horn and caught up with the bus at a gas station (p. 22a). At the gas station Walter examined his car and found the rear bumper bent, the left rear mudguard bent *out* and a thin chromium strip loose from the side of the fender apron (pp. 23a-25a). There was no proof of the extent of repairs required. Plaintiffs offered no evidence of any marks on defendant's bus.

At the gas station all four Rowes got out (pp. 80a, 81a, 94a), none of them complained of any injury (p. 63a) and subsequently they drove five or six hours (175 miles) to Hightstown, New Jersey, where they spent the night

(pp. 27a, 96a). They drove a total of 450 miles that day, and the next day (Sunday) they drove all day from Hightstown to Lynn, Massachusetts (pp. 27a, 98a).

Although plaintiffs Marie and Fernn suffered no apparent injuries there subsequently followed a lengthy history of complaints including, eventually, surgical intervention. Both of these women had serious prior medical histories (pp. 108a, 130a, 161a, 173a, 179a, 281a) which raised a real question as to whether or not any of the conditions claimed by these women were due even in part to the alleged accident. Fernn Rowe was then at times wearing a Thomas Medical Collar and had it with her in the car at the time of the alleged occurrence herein (pp. 165a, 166a). Her own doctor, Dr. Potter, had found her a chronic psychosomatic (pp. 179a, 281a).

At the close of plaintiffs' case defendant moved to dismiss the complaint and/or for a directed verdict on the grounds (1) that the evidence was insufficient in law to establish any actionable negligence on the part of the defendant which was the proximate cause of injury to either of the plaintiffs and (2) that the evidence was insufficient to establish that the defendant's vehicle was in contact with or collided with the automobile in which the plaintiffs were occupants. This motion was denied (pp. 182a, 183a).

The defendant's driver Gordon B. Williams denied that the bus had struck Walter's car or any other car and repeated this denial on the trial (pp. 245a, 246a). As the bus approached and stopped at the traffic light and for at least a quarter of a mile before, the bus was only in the inside lane (p. 243a). The plaintiffs' testimony also placed the bus in the inside lane (pp. 16a, 17a, 19a). There were cars ahead of the bus, in the same lane with the bus as it approached the light, but those cars went through

on the amber light, the bus being first in that lane to stop for the traffic light, which turned red as the bus reached it (pp. 243a, 244a).

The testimony in the case clearly shows there were no marks or indications of contact anywhere around the front corner, the right-hand side, or on any other part of the bus (pp. 255a, 273a-274a, 275a-276a).

At the end of the whole case the defendant renewed the motions made at the close of plaintiffs' case to dismiss and for a directed verdict (p. 284a). The motions were denied (p. 284a).

The jury verdicts totalled $43,500.00 as follows: $28,000.00 for Marie Rowe, $8,000.00 for her husband Walter H. Rowe, $5,000.00 for Fernn V. Rowe, and $2,500.00 for Henry C. Rowe (p. 315a).

The Theory of Plaintiffs' Case.

Plaintiffs proceeded on the theory that to show defendant liable they need only testify as to a mysterious contact to the rear of Walter's car, while on a crowded four-lane highway, in a summer Saturday afternoon's traffic and then show that the defendant's bus was then *somewhere* in some undisclosed position in a different lane in the general vicinity. The theory however finds no support in the cases or authorities. Counsel has been unable to find a single reported case where an action involving alleged collision between motor vehicles had been permitted to go to the jury on such legally insufficient evidence. Here is not a case where the bus was the *only* vehicle in the vicinity nor shown to be the *only* vehicle which might possibly have been in contact with plaintiffs' car. On the contrary, there were other cars moving immediately to the rear of and alongside of Walter's car. Nor was there any evidence of contact

found on the bus. Thus there was no basis upon which the jury could find, other than upon pure speculation and conjecture, that defendant's bus was the object which came in contact with plaintiffs' automobile. The possibilities inherent in such a situation beggars the imagination. In short this case discards all limitation on the use of circumstantial evidence and substitutes the roulette wheel for logic and reason.

Reasons for Allowance of the Writ.

Petitioner believes that the writ should be granted for the following reasons:

1. The Court of Appeals erred in affirming the judgment of the District Court since in this diversity case *Erie* v. *Tompkins*, 304 U. S. 64, dictates that the New York law must control, and under the governing New York decisions the circumstantial evidence upon which plaintiffs relied as a matter of law was totally insufficient to justify submission to the jury.

The Court of Appeals recognized, in its opinion, that on the question of sufficiency of evidence the New York decisions must control in this diversity case. But then the Court went out of its way to avoid the proper application of the New York rule as to sufficiency of evidence in non-death cases involving circumstantial evidence. If the rule of *Erie* v. *Tompkins, supra,* is to have any meaning, and the local law is to control in these diversity cases, then the lower Federal Courts must be required to apply the proper and applicable local law. That was not done here.

In the New York Courts circumstantial evidence, in a proper case, may be and is accepted in lieu of direct evidence. However, its use has well defined limits. The New York rule is that the inferences of negligence and proximate cause must be the *only ones that can fairly and reasonably be deduced from the facts.* While it is not necessary to exclude every other possible hypothesis, *every other reasonable hypothesis must be excluded.*

Cole v. *Swagler,* 308 N. Y. 325;
Wank v. *Ambrosino,* 307 N. Y. 321;
Boyce Motor Lines v. *State of New York,* 280 App. Div. 693, aff'd 306 N. Y. 801;
Eaton v. *New York, C. & H. R. R. Co.,* 195 N. Y. 267;
Lopez v. *Campbell,* 163 N. Y. 340, 347;
Scharff v. *Jackson,* 216 N. Y. 598;
Towne v. *Bunce,* 283 App. Div. 847, aff'd 307 N. Y. 868.

In New York cases involving death in automobile accidents, a plaintiff is not held to as high a degree of proof of the cause of the accident and negligence as where the plaintiff can in person describe the occurrence (*Noseworthy* v. *City of New York,* 298 N. Y. 76). But even in such death cases the Courts of New York have rejected circumstantial evidence of the character sought to be relied upon by the plaintiffs in this case.

Cole v. *Swagler, supra;*
Wank v. *Ambrosino, supra.*

Under the New York rule, it is not enough that the circumstantial evidence shows that defendant's bus *might* have been the cause of the impact; the burden was upon

the plaintiffs to show circumstances under which it would appear that none of the other vehicles admittedly in the immediate vicinity reasonably could have caused it.

Cole v. *Swagler, supra;*
Wank v. *Ambrosino, supra;*
Scharff v. *Jackson, supra;*
Digelormo v. *Weil,* 260 N. Y. 192.

So that where it appears from the circumstantial evidence that a claimed accident is one which might have resulted as well from one cause as another, or where such accident might have occurred from a cause other than defendant's negligence, the action must fail.

Cole v. *Swagler,* 308 N. Y. 325;
Scharff v. *Jackson, supra;*
Wank v. *Ambrosino, supra.*

The Court of Appeals herein stated (Opinion, p. 20) that the evidence supports the "reasonable inference that the bus, rather than some other unidentified vehicle, struck plaintiffs' car". It then cites as its authority for the New York law the cases of *Dillon* v. *Rockaway Beach Hospital,* 284 N. Y. 176 and *Cornbrooks* v. *Terminal Barber Shops,* 282 N. Y. 217. The citation of those cases discloses the clear error of the decision. It can readily be demonstrated that those cases are not in point.

The Courts of New York in formulating their circumstantial evidence rule have carefully and clearly distinguished those situations where there are other "reasonable" causes from those where there are other "remote" causes. The *Dillon* case, *supra,* the *Cornbrooks* case, *supra,* and the case of *Ingersoll* v. *Liberty Bank of Buffalo,* 278 N. Y. 1, also relied on by the Court of Appeals, were cases

where the only other possibilities were "remote". Those cases clearly are not controlling here. In the case at bar we are dealing with the possibility, among others, of the damage having been caused by the cars admittedly directly behind or alongside of the plaintiffs' car. That obviously is not a remote but a very reasonable if not the most reasonable hypothesis. The inference or hypothesis of a rear-end collision by another car rather than by defendant's bus, is completely consistent with the evidence in this case. The controlling cases therefore are those New York cases dealing with the necessity of the exclusion of such reasonable or equal possibilities.

The choice first made by the jury and then by the Court of Appeals between the possibilities cannot be sustained for the simple reason that, under the New York law, the proof of the claimed cause (where reliance is had on circumstantial evidence) must exclude any other reasonably possible cause. Any choice between the reasonably possible causes of this claimed accident, in the state of the record as left by the plaintiffs, could not be made without the very speculation which the New York rule on circumstantial evidence is designed to prohibit. The trial Judge was in error in denying defendant's motion to dismiss or for a directed verdict and the affirmance by the Court of Appeals was also clear error.

The Court of Appeals herein said (opinion, p. 20) that "The inference drawn here was no more tenuous than those which juries have been permitted to draw in several New York cases. E. G., *Garippa* v. *Wisatsky,* 305 N. Y. 57 (1953); *Ingersoll* v. *Liberty Bank of Buffalo,* 278 N. Y. 1 (1936)." The *Garippa* case, the correct citation of which is 108 N. Y. S. (2) 67, not officially reported (aff'd without opinion, 280 App. Div. 807; 305 N. Y. 571) cited by the Court

of Appeals is not in point. In the *Garippa* case (which was a non-jury trial) there was *direct proof* that the plaintiff was struck by a dark green delivery truck. In that case there was merely the question of proving the identification of the truck. The question here is not whether the inference the jury could draw was tenuous, but whether the circumstantial evidence was sufficient, *prima facie,* when tested by the applicable and controlling New York decisions limiting the use of circumstantial evidence. As pointed out above (p. 10) the *Ingersoll* case was a "remote" cause case. The Court there rejected a "tenuous" inference in deference to a reasonable inference.

The Court of Appeals' decision here represents a substantial departure from New York law in permitting a jury to decide a case when the circumstantial evidence gave rise to more than one reasonable inference, so that the choice of inferences by the jury was necessarily based purely on speculation and conjecture.

The corollary to the New York rule limiting the use of circumstantial evidence, referred to above, is the basic New York rule that an inference cannot be based on an inference.

> *Lamb* v. *Union Ry. Co.*, 195 N. Y. 260, 266;
> *Ruppert* v. *Brooklyn Heights R. R. Co.*, 154 N. Y. 90;
> *People* v. *Razezicz*, 206 N. Y. 249.

The Court of Appeals in this case, with such highly speculative and questionable circumstantial evidence, refused to follow the controlling New York decisions on this subject of inferences. Instead the Court questioned the New York rule against basing an inference on an inference, citing as authority *Wigmore on Evidence,* §41 (3rd Ed.). But since Professor Wigmore's ideas on the inference rule are at odds

with the controlling New York cases, the Professor's position is of no concern. The Court's statement, however, points up its own unwillingness to be bound by the controlling New York law in this case. As further evidence of its unwillingness to be bound by controlling New York law the Court cites as authority its own decision of *Gutierrez* v. *Public Service Interstate Transportation Co.*, 168 F. (2d) 678, which it claims, parenthetically, follows the New York law. A reading of the decision in the *Gutierrez* case indicates that the Court of Appeals in that case was quite uncertain as to what was the controlling New York law. But that case at best is obviously an extreme application of the New York rule on parallel inferences, a rule not applicable here.

The New York cases recognize that there may be situations in a proper case, where the same set of facts may give rise to parallel inferences which exist independently of each other. The facts herein give rise to no such parallel inferences

Allen v. *Stokes*, 260 App. Div. 600;
Lowy v. *Green*, 272 App. Div. 238;
Scantlebury v. *Lehman*, 305 N. Y. 713.

These so-called parallel inference cases fall into two categories. The first group consists of cases where there is evidence of actual negligence, such as intoxication and failure to observe a collision (*Allen* v. *Stokes, supra*) or driving in the rain with a faulty windshield wiper (*Lowery* v. *Green, supra*). In other words, in the first group, negligence was one of the elements of the circumstances *proved* which gave rise to an inference of contact, and those same circumstances gave rise to the further "parallel" inference that contact was caused by the defendant's proved

negligence. The second group of cases is well illustrated by the *Scantlebury* case, *supra*. In such cases, negligence is inferred without reliance on the prior inference of contact because of the defendant's driver's testimony that he did not see an object or person which the circumstances proved must have been in the path of the defendant's vehicle and therefore within the direct line of vision of the driver.

The parallel inference rule obviously has no application here. Here we plainly have a case of an inference built upon an inference, unsustainable under New York law. It is impossible, in the absence of direct proof as to either contact or negligence, to have the findings of contact and negligence as inferences existing independently. The inference of negligence cannot here be found without dependence upon the inference of contact. Thus we have an inference upon an inference.

The failure of the Court of Appeals to apply the proper New York law to the circumstances of this case results in the imposition of absolute liability on the defendant, in an automobile negligence case predicated on circumstantial evidence, so that the defendant is made liable without proof of fault. In so doing that Court was compounding the error already in the case by virtue of the Trial Court's charge, in which, contrary to New York law as well as Maryland law (the situs of the occurrence) that Court had, over objection, sought to impose absolute liability on the defendant (p. 293a).

2. The determination of the Court of Appeals if permitted to stand will have a broad impact upon the Bench and Bar of the land because that Court has erroneously departed from all precedents on the question of sufficiency of evidence in the trial of a negligence case involving alleged collision between motor vehicles travelling in dense or heavy traffic and where the testimony is wholly circumstantial as to both contact and negligence.

Here the plaintiffs, claiming a questionable impact to the rear of their car, without any direct proof, have simply reached out and tagged the defendant as the offending party and therefore liable to them in the large sum of money represented by the judgments herein. It is inconceivable that our judicial process will permit recovery when both the claimed collision and the claimed negligence necessary for legal liability are predicated upon the pure speculation and conjecture found in this case.

The case is therefore one of vital importance to the Bench and Bar generally because it involves one of the first principles in importance to litigants, i. e., the measure of proof which a plaintiff must produce in order to present a case which may go to a jury. The decision in this case also vitally affects everyone in the country who drives an automobile. The general importance of this case stems from the fact that in this every day, common type of motor vehicle case, involving an alleged collision on a crowded highway, the wholly circumstantial evidence upon which the plaintiffs' case rested was clearly insufficient by all usual tests.

If the evidence in this case did not require dismissal of the complaint or direction of a verdict for the defendant then it is difficult to conceive of a situation in which the Court could ever find evidence insufficient to go to a jury.

In New York the propriety of motions to dismiss is still recognized and it is the duty of the Trial Court to determine whether or not sufficient evidence has been produced to warrant submission of the case of the jury.

Wank v. *Ambrosino*, 307 N. Y. 321;
Blum v. *Fresh Grown Preserve Corp.*, 292 N. Y. 241, 244, 245;
Baulec v. *New York & Harlem R. R. Co.*, 59 N. Y. 356;
Civil Practice Act, §457a

The same is true in the Federal Courts.

McNabb v. *Virginian Ry. Co.*, 55 F. (2d) 137;
South Carolina Asparagus Growers v. *Southern Ry. Co.*, 46 F. (2d) 452;
Rule 50 of the *Federal Rules of Civil Procedure.*

This is basically a common law negligence action. In the usual, ordinary process of the trial of such a case the Trial Court, in the Federal as well as the New York Courts, has both the duty and the right to determine whether or not, as a matter of law, sufficient evidence has been adduced to warrant the submission of a case to the jury to resolve questions of credibility as between witnesses and the parties.

These plaintiffs did not see what had hit them but merely concluded that the bus that passed in the next lane, rather than other cars to the rear and at the side, had struck their car. There was no probative evidence, circumstantial or otherwise, to show that defendant's driver had been negligent. There was the mere conclusion of these plaintiffs as to that. Obviously that is not enough in any case. Cf. *Pennsylvania Railroad Co.* v. *Chamberlain*, 288 U. S. 333.

The *Chamberlain* case, *supra,* is especially applicable here because of the unimpeached testimony of the defendant's driver that he did not strike or come into contact with the plaintiffs' car, his testimony being consistent with the facts that were proved.

It has been said that not the least in importance to the business of this Court is the guidance of the lower Courts and the Bar in the effective and economical conduct of litigation (*Johnson* v. *New York, N. H. & H. R. Co.,* 344 U. S. 48, 55). The determination of this case by the Courts below is such a radical holding that the Bench and Bar should be instructed by the determination of this Court on the question involved. This case is a good example of the subtle erosion of a legal principle, the purpose of which was the protection of defendants against unjust, fictitious or questionable claims of damage or injuries. In a country where there are millions of motorists, buses and trucks using the highways daily the problem presented here is of almost constant creation. The determination of the Courts below marks a departure from accepted legal tenets and rules which should not be permitted.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Livingston Platt,
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Clarence E. Mellen,
Dennis P. Donovan,
Of Counsel.

Appendix.

Opinion.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 265—October Term, 1955.

(Argued February 10, 1956 Decided March 16, 1956.)

Docket No. 23747

MARIE ROWE, WALTER H. ROWE, FERNN V. ROWE and HENRY C. ROWE,

Plaintiffs-Appellees,

v.

PENNSYLVANIA GREYHOUND LINES, INC.,

Defendant-Appellant.

Before:

MEDINA, LUMBARD and WATERMAN,

Circuit Judges.

Appeal form the United States District Court for the Southern District of New York, Edward A. Conger, Judge.

Defendant appeals from a judgment for the plaintiffs entered upon a jury verdict in their action to recover for injuries sustained by two plaintiffs as a result of defendant's alleged negligence and for the loss of society and companionship suffered by the two plaintiff husbands.

JOHN J. TULLMAN (Benjamin H. Siff, of counsel, on the brief), for plaintiffs-appellees.

CLARENCE E. MELLEN (Bleakley, Platt, Gilchrist & Walker, Dennis P. Donovan, Ernest S. Ballard, Jr., Robert L. Conkling, of counsel, on the brief), for defendant-appellant.

LUMBARD, Circuit Judge:

This action arose out of an alleged collision between defendant's passenger bus and plaintiffs' 1948 Buick sedan on Route 40 on the outskirts of Baltimore, Maryland. On August 21, 1948 plaintiffs Walter and Henry Rowe, brothers, and their respective wives, Marie and Fernn, were traveling north on Route 40 in Walter's car, returning from a vacation. The men were seated in the front, with Walter driving, while the ladies were in the back seat, each directly behind her husband. The plaintiffs' car stopped for a traffic signal, being the fourth or fifth car in its lane, and plaintiffs testified that while stopped they felt something strike the left rear side of the auto throwing it on an angle to the right. No direct evidence was introduced as to what collided with the auto but the parties plaintiff testified that immediately after the crash a bus owned by the defendant passed within inches of the car. The bus continued on its way until, after a chase, the plaintiffs caught up to it and forced it to the side of the road. The driver denied that he had hit the plaintiffs' car and repeated this denial at the trial. After this incident the plaintiffs continued to Hightstown for the night and then on to Lynn, Massachusetts the next day. No one complained of any injury until after returning home, when both of the ladies went to see a doctor, Marie complaining of a pain in the small of her back, Fernn of a pain in her arm and her neck. Thereafter Marie's condition was diagnosed as a ruptured disk and she underwent surgery for removal of the disk and a fusion of spinal vertebrae.

Fernn was operated on for the removal of a bursa and then for severance of the left scalenus muscle. The women sued for these personal injuries and their husbands for the loss of consortium resulting therefrom. No claim was made for property damage.

Conflicting medical testimony was introduced at the trial as to whether these injuries were the direct result of the accident. At trial the defendant made motions to dismiss the action and for a directed verdict, which were denied. The defendant contends on this appeal that the trial court committed error in denying these motions. Further error is assigned in a portion of the trial judge's charge.

Since this is a diversity case we must look to the law applied in the courts of New York. This is true for the rules determining the sufficiency of the evidence as well as the rules of substantive liability. *Stoner* v. *New York Life Insurance Co.*, 311 U. S. 464 (1940); *Gutierrez* v. *Public Service Interstate Co.*, 168 F. 2d 678, 679-80 (2 Cir. 1948). A New York court would apply the substantive law of Maryland, the place where the accident occurred, but would apply its own rules in determining the sufficiency of the evidence. *Geoghegan* v. *The Atlas Steamship Co.*, 3 Misc. 224, 227 (1893), aff'd 146 N. Y. 389; *Franklin Sugar Refining Co.* v. *Lipowicz*, 220 App. Div. 160, 165 (4th Dept. 1927), aff'd 247 N. Y. 465; Restatement of Conflict of Laws §595.

The first question raised by the defendant is whether there was sufficient evidence to take the case to the jury. The defendant attacks the plaintiffs' case at three points: (1) Insufficiency of the evidence that defendant's bus hit the plaintiffs' car, (2) insufficiency of the evidence that the defendant's driver was negligent and (3) insufficiency of the evidence to show a causal connection between the accident and the injuries suffered by Marie and Fernn.

1. The plaintiffs' evidence that their car was hit by the bus was sufficient to go to the jury. In New York, as elsewhere, questions of credibility are for the jury to resolve. E.g., *McDonald* v. *The Metropolitan Street Rail-*

way Co., 167 N. Y. 66 (1901); *Sadowski* v. *Long Island R. R. Co.*, 292 N. Y. 448, 454-55 (1944). The plaintiffs presented evidence, which the jury might have believed, that their car had come to a stop, that it was struck on the left rear side, that no car was passing at the time of the impact, and that immediately after the impact the defendant's bus passed on their left about 10 or 12 inches from their car. Although the defendant's driver testified that he did not hit the plaintiffs' car, it was for the jury to decide what had happened. The plaintiffs' testimony indicates that the damage to the car was such that it was probably inflicted by a sideswiping collision rather than an impact from directly behind. This evidence was sufficient to permit a reasonable inference that the bus, rather than some other unidentified vehicle, struck the plaintiffs' car. This is all that the New York law requires. *Dillon* v. *Rockaway Beach Hospital*, 284 N. Y. 176 (1940); *Cornbrooks* v. *Terminal Barber Shops*, 282 N. Y. 217 (1940). The inference drawn here was no more tenuous than those which juries have been permitted to draw in several New York cases. E.g., *Garippa* v. *Wisatsky*, 305 N. Y. 571 (1953); *Ingersoll* v. *Liberty Bank of Buffalo*, 278 N. Y. 1 (1938).

2. The defendant next contends that even if it was shown that the defendant's bus hit the plaintiffs' car, there was insufficient evidence to show that the impact was the result of the negligence of the defendant's driver. The testimony established that plaintiffs' car was stationary at the time of the impact waiting for a traffic light, that the road was dry and in good condition and the weather clear, and that the plaintiffs' car was struck at the left rear side. This was enough to permit the jury to infer that the accident was caused by the driver's negligence in failing to allow sufficient clearance in passing the plaintiffs' car. Defendant contends that this involves basing an inference on an inference and is therefore objectionable. Even if it is improper to base an inference on an inference, *but cf.*, 1 Wigmore on Evidence §41 (3rd Ed.), that is not what happened here. The inferences that it was the defendant's bus

which struck the car and that the collision resulted from the bus driver's negligence are parallel inferences based on the same facts. Cf. *Gutierrez* v. *Public Service Interstate Co., supra* [applying New York Law].

3. There was an abundance of expert medical testimony to show the nature of the injuries suffered by Marie and Fernn and to support a finding that the injuries were caused by the accident in question. Defendant first objects to this evidence on the ground that the doctors testified only that the accident was "*a* competent producing cause of the injuries," and not that it was *the* cause. This objection is clearly frivolous. Cf. *Cornbrooks* v. *Terminal Barber Shops, Inc., supra.* Defendant next complains that the hypothetical questions put to the doctors omitted certain facts. A hypothetical question need not, however, include every fact in the case. The questions used here were comprehensive enough to provide a basis for a jury finding of causation. The defendant could have protected itself by objecting to the questions when they were asked or by bringing out on cross-examination the effect of the omitted facts on the doctors' opinions. These steps it did not take.

The defendant's final objection is directed at a portion of the charge to the jury which appears in the record as follows:

> "It gets down to simply this, and it is a simple, ordinary rule, that one must operate his automobile on the highway in a careful and prudent manner, and if he fails and an accident results therefrom, and it happens because of his failure to operate his automobile in a careful and prudent manner under all the circumstances, then, of course, that is negligence and he is liable for the results.
>
> "The defendant's bus driver here, in overtaking and passing the plaintiffs' automobile, was under the duty of using reasonable care in passing plaintiffs' car, if it did so pass, and *making certain that there*

was adequate room for him to do so without touching any part of plaintiffs' automobile." [Emphasis added.]

The defendant contends that the emphasized words amounted to a charge that the defendant was absolutely liable if the bus struck the car. We do not so read the judge's instructions. It seems clear that the jury, in the light of the entire charge and the facts of the case, must have understood that the court was charging that the driver was "under the duty of using reasonable care in • • • making certain" that there was room to pass. The charge as a whole made it quite plain that the driver's duty was no more than the exercise of reasonable care.

The judgment is affirmed.

Judgment.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of March, one thousand nine hundred and fifty-six.

Present:

Hon. HAROLD R. MEDINA,
Hon. J. EDWARD LUMBARD,
Hon. STERRY R. WATERMAN,
Circuit Judges.

MARIE ROWE, *et al.*,
Plaintiffs-Appellees,

v.

PENNSYLVANIA GREYHOUND LINES, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed; with costs taxed in favor of the appellees.

A. DANIEL FUSARO,
Clerk.

(1980)

Supreme Court, U.S.
FILED
JUN 5 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1955

No. 967

PENNSYLVANIA GREYHOUND LINES, INC.,
Petitioner,

against

MARIE ROWE, WALTER H. ROWE, FERNN V. ROWE and HENRY C. ROWE,
Respondents.

BRIEF FOR THE PLAINTIFFS-RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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BRIEF FOR THE PLAINTIFFS-RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinion Below

The District Court rendered no opinion. The opinion of the Court of Appeals, Second Circuit, is not yet reported. It appears at pages 17-22 of the petition.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Questions Presented

Whether the Court of Appeals for the Second Circuit in affirming a judgment in respondents' favor in a personal injury action obtained in the United States District Court for the Southern District of New York correctly applied the law of New York dealing with circumstantial evidence and the inferences that may be properly drawn therefrom, it being conceded that the New York law with respect to quantum of proof is the applicable law.

Statement

The case involved an automobile collision that occurred in Maryland. The action was tried in the Southern District of New York. All parties agreed that Maryland substantive law was applicable and that the New York rules as to the quantum of proof necessary to establish the cause of action were the ones to be invoked. The trial court did precisely that, and the Court of Appeals for the Second Circuit held that the trial court did so correctly.

The essential facts appear in the opinion of Judge Lumbard writing for the unanimous Court of Appeals and require no re-stating (pages 17-22 of the petition).

POINT ONE

The Court correctly applied the New York rule as to circumstantial evidence and the inferences to be drawn therefrom.

A

As to the issue of petitioner's bus striking Rowe's vehicle

The law of New York as to quantum of proof, concededly here applicable, is that:

> "Circumstantial evidence is sufficient if it supports the inference of causation of negligence even though it does not negative the existence of remote possibilities that the injury was not caused by the defendant or that the defendant was not negligent."
>
> *Dillon* v. *Rockaway Beach Hospital and Dispensary*, 284 N. Y. 176, 179.

> "The existence of remote possibilities that factors other than the negligence of the defendant may have caused the accident does not require a holding that plaintiff has failed to make out a prima facie case. It is enough that he show facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred."
>
> *Ingersoll* v. *Liberty Bank of Buffalo*, 278 N. Y. 1, 7;
>
> *Cornbrooks* v. *Terminal Barber Shops, Inc.*, 282 N. Y. 217, 223.

The rule is no different when the issue is the identity of the wrongdoer. *Klein* v. *Long Island Railroad,* 99 N. Y. S. 2d 50, affirmed in 278 App. Div. 980 and in 303 N. Y. 807; *Garippa* v. *Witsotsky,* 108 N. Y. S. 267, affirmed in 280 App. Div. 807 and in 305 N. Y. 571; *Gutierrez* v. *Public Service Interstate Transportation Co.,* 168 F. 2d 678.

Garippa v. *Witsotsky,* 305 N. Y. 571, is peculiarly applicable. In that case plaintiff was struck by a motor vehicle. All he could say about it was that it was dark green in color with some kind of lettering on the side which he could not make out, and that a smell of fresh baking came from it. Defendant was in the baking business and was the owner of a dark green delivery truck. It was established that the business of defendant required the presence of its truck at the scene of the accident. It was held that the foregoing constituted sufficient proof of the identification of the defendant as the wrongdoer even though plaintiff did not exclude the possibility of some other truck of the same description being in the vicinity.

Here we have a car at a standstill. It was struck on the left side at the rear so as to be pushed to the right. A second later a bus passes by on the left, ten to twelve inches away. No other vehicle was present at the left side of the struck car when the impact occurred. The damage done was precisely consistent with a sideswipe along the left rear side of the affected vehicle.

To say that on such proof it would be unreasonable, *as a matter of law,* for a jury to infer that the bus was responsible for the damage is to deny validity to ordinary everyday reasoning processes. The authorities above cited are clear that the law is not so stultified.

Petitioner's thesis is that the reasonableness of the inference that follows from the above proof is destroyed as a matter of law because: (1) the bus was not damaged; (2) plaintiff did not exclude by direct proof the possibility of plaintiff's vehicle having been struck by a car immediately behind it. Both grounds are untenable.

As to (*1*) The claim that the bus was not damaged came from Williams, the accused wrongdoer, and from Musero, an employee of the petitioner. Their testimony was, therefore, interested, and the jury was free to reject it. *Noseworthy* v. *City of New York*, 298 N. Y. 76; *Piwowarski* v. *Cornwell*, 273 N. Y. 226; *Schultze* v. *McGuire*, 241 N. Y. 460.

Assuming, however, that the bus was not damaged, that fact is certainly not conclusive of the issue litigated. What will happen when two vehicles collide is impossible of prediction. The slightest differences in weight, angles of impact, speeds, or in any of the other factors that play a part in a collision accident, can produce well nigh incredible variances in results. We all know that there is many an automobile accident in which one occupant is most seriously hurt while another sitting next to him escapes without a scratch. It is a commonplace that collisions occur in which one vehicle is demolished and the other remains unmarked. Therefore, that the bus purportedly did not have any marks of damage on it cannot be conclusive on the issue of whether there had been a contact between it and the respondent's car. Particularly is this so when we have in mind the size and weight of a bus in relation to the size and weight of a passenger vehicle and that the contact was of a sideswiping nature. The most that could be said for the claim that the bus had no marks on it was that it was something for the

jury to consider. The jury has considered it, more defendant cannot ask.

As to (*2*). Apart from the authorities heretofore cited to the effect that a plaintiff is not required to exclude all possible causes for an accident other than defendant's negligence in order to present a *prima facie* case, we submit that, factually, there was an exclusion of the possibility of plaintiff's car having been struck by someone immediately behind.

The fact that the car *was not* pushed straight ahead, but was pushed to the side, clearly indicates that the blow did not come from directly behind, but that it came from behind and from the left and the only vehicle that was in position to do that was the bus. The side movement of the Buick, joined with the nature and location of the damage done to it, was evidence which justified the jury in concluding that respondent's car had not been struck by any vehicle immediately behind it.

The Court had instructed the jury, at page 289, that it was not to infer that the bus struck the automobile solely from the proof of damage to plaintiff's automobile, that they were to take into consideration *all of the facts* in the case. The above certainly founded a rational basis for the jury to exclude the possibility of a vehicle other than the bus as being the one that struck the Buick.

B

As to the negligence of the petitioner

Argument is made that a finding of petitioner's negligent responsibility for the accident is a product of an inference based on inference. The argument ignores the record.

What was proved here was not an accident in a vacuum, undefined, undescribed and intangible, from the mere happening of which an inference of fault was urged. The nature and details of the accident, a sideswiping collision, were fully proved by direct proof.

That respondent's car was at a standstill was a fact directly proved.

That while it was at a standstill for an appreciable length of time it was struck on the left at its rear, was a fact directly proved.

That the collision occurred in broad daylight on a dry road, in good weather, with nothing to obstruct the view of any driver, was a fact directly proved.

That the damage sustained by the car was the kind that could result only in a sideswiping maneuver from the rear was a fact directly proved.

These were all facts, not conjectures or surmises or guesses as to what happened.

In other words, whoever it was that drove the offending vehicle was proved to have been negligent, not inferentially, not circumstantially, but directly. It can scarcely be denied that when a driver of a vehicle operating it in broad daylight, on a dry road, in good weather, with nothing to obstruct his view, sideswipes a vehicle in front of him that is at a standstill in compliance with traffic signals, he is negligent. At least the issue was one for the jury.

"When a motor car is lawfully standing in or at the side of a street, and there is ample room to pass without colliding, it is negligence or contributory negligence to drive into it particularly when the weather is clear, the headlights good and the roads otherwise unobstructed."

Huddy's Cyclopedia of Automobile Law, Ninth Edition, Vols. 3-4, pp. 111-112.

Because the *identity* of the offending vehicle was established circumstantially, or by inference, does not make the case one of inference on inference. If that were so, no injured person could ever recover where a wrongdoer denies participation in an accident and his participation has to be proved circumstantially or by inference. We know that that is not the law from the authorities heretofore cited.

Even were the accident itself proved inferentially, and here it was proved directly, the inference on inference rule would not apply because the same facts and circumstances support both the inference of the happening of the accident and that it was a result of negligence. In such a situation under New York law, the inferences are deemed parallel inferences based upon the same facts and constitute a valid basis for recovery. *Allen* v. *Stokes,* 260 App. Div. 600; *Gutierrez* v. *Public Service Interstate Transportation Co.,* 168 F. 2d 678.

We do not have to go so far in the instant case. The collision in all its details was proved and they establish that the collision was the product of negligence. Petitioner's authorship of the collision was proved circumstantially—a full case for submission to the jury was made out.

That Williams, the driver of the bus, denied contact is manifestly not dispositive of the issue. Since he was the person accused of wrong, his testimony was highly inter-

ested and the jury were at liberty to disbelieve him. *Noseworthy* v. *City of New York*, 298 N. Y. 76

Pennsylvania Railroad v. *Chamberlin*, 288 U. S. 333, relied on so strenuously by petitioner, is wholly irrelevant. In that case plaintiff alleged an inference of negligent contact between two railroad cars in a railroad yard as a result of which the deceased was injured because a witness, while 900 feet away from the point where the deceased was eventually found, heard a crash, "not an unusual event in a switching yard". The witness did not look around to see where the crash came from, but later concluded that it must have come from cars that passed the place where the deceased had been working. Obviously, on such facts, it was equally possible that the crash could have come from other cars in the yard, and consequently, it was held that plaintiff's burden of proof had not been met. That is certainly not this case.

POINT TWO

The petition lacks substantial ground because it turns upon the particular facts involved.

The case is a simple negligence case involving a collision between two motor vehicles. The only legal question is the sufficiency of the evidence, based in part on circumstantial evidence, to establish a jury question on the issues inherent in a collision case. There is nothing in the case of such signal significance as to warrant review by this Court.

Sufficiency of evidence is not a problem to induce granting of a writ. *N. Y. Cent. R. R.* v. *Kinney*, 260 U. S. 340,

346 (1922). "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it." *General Pictures Co.* v. *Electric Co.,* 304 U. S. 175, 178 (1938). See McElwain, "The Supreme Court's Business Under Hughes," 63 Harv. L. Rev. 5, 13, n. 14 (1949). "The decision of the highest court of a state on matters of state law are in general conclusive upon us, and ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts * * *" *Huddleston* v. *Dwyer,* 322 U. S. 232, 237 (1944).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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